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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1527

JOSEPH FISHMAN,

Petitioner,

—v.—

CITY OF STAMFORD, *et al.*,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The statement of the Opinions Below is adequately set forth in the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Where property was acquired from the Church pursuant to a redevelopment plan and the plan provided that the Church and other non-profit institutions be allowed to acquire additional adjacent land in order to keep such institutions in the downtown area so as to create an atmosphere of balanced and integrated uses, has the Establishment Clause of the First Amendment been violated by a sale to the Church pursuant to an established re-use formula which formula is applied to all similar non-profit institutions acquiring property pursuant to the redevelopment plan.

Additional Statutes

Section 8-137, Connecticut General Statutes Revision of 1958 printed in pertinent part in the Appendix, *infra*, p. 15.

Statement of the Case

In addition to the facts set forth in the Statement of the Case in Petitioner's Brief, the Respondent submits that the additional following facts should be before this Court.

The Urban Renewal plan for downtown Stamford, Connecticut encompasses an area of approximately 130 acres.

A major goal of the redevelopment plan is to provide an environment that will make it possible for the full economic and social potential of the central core of the City of Stamford, which goal is to be realized by intense development and multi-use.

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To accomplish this goal and achieve its objective, the Plan provides that certain institutions, such as the St. John's Roman Catholic Church and other similar institutions would be given an amount of adjacent land approximately equal in size to that being taken so that these institutions could remain in the downtown area. Petitioner's property is of major importance in helping the Plan achieve its goal.

Petitioner's property is adjacent to the St. John's Roman Catholic Church, which Church is to remain in the downtown Stamford area. The St. John's Roman Catholic Church serves a parish that includes most of downtown Stamford. The Church building is a very substantial, attractive building and the Church facilities include a Rectory, a school and a Convent, thus, serving the religious needs of many people in the downtown area.

Under the Plan the Convent of St. John's Roman Catholic Church is being taken for non-profit moderate income housing. There is a provision in the Plan providing that the Church will be sold an amount of adjacent land equal in size to that being taken which will allow the Church to remain within the project area. As pointed out above, keeping the Church downtown is consistent with the objectives of the Plan.

The price at which the Respondent will acquire all properties in the Plan including the Petitioner's property is based upon fair market value. This acquisition price is determined by or concurred in by the Federal Government. Prices for disposition of properties are called Re-use prices and are based upon fair market value taking into account the limitations on re-use of the property pursuant to the

controls of the Urban Redevelopment Plan. Re-use prices for land in a redevelopment area are also finally determined or concurred in by the Federal Government. The Petitioner's property under the Plan is limited to semi-public use in the first instance and to an alternative use of moderate income housing.

ARGUMENT

I.

The sale of Petitioner's property to the Church is not an unconstitutional aid to a religious organization.

The Petitioner argues that the Respondent is conferring a direct aid to a religious institution because it is acquiring Petitioner's property at a price higher than that which it is to be resold to the St. John's Roman Catholic Church and that this is in violation of the Establishment Clause of the Federal and Connecticut Constitutions. The simple facts of the case are, however, that the Respondents are acquiring Petitioner's property unencumbered by any re-use provisions of a redevelopment plan and selling something different to the Church. The property sold to the Church is now limited in its use pursuant to the redevelopment plan and is being sold pursuant to established federal formulas which are also recognized by Connecticut statutes on redevelopment.

All property in a redevelopment program, including Petitioner's, must be acquired for fair market value. This price is based upon at least two separate independent appraisals with the maximum acquisition price determined by or concurred in by the Federal Agency.

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Petitioner's property, and other properties being sold to non-profit institutions, are sold at re-use price which is based upon the fair market value of the property, taking into account however the limited re-use of the property permitted by the controls of the Urban Redevelopment Plan. This formula for re-use pricing is established by federal regulations. Thus, the re-use price of petitioner's property is limited by the fact that its primary use under the controls of the Plan is for semi-public use with an alternative of moderate income residential housing. In addition to the federal formula, the concept of resale at use value is expressly recognized by the Connecticut General Statutes. *Conn. Gen. Stats.* §8-137 (Rev. 1958).

In addition to the Federal regulations and statutory approval of sale at re-use prices, there is judicial precedent permitting the Respondents to acquire the Petitioner's property for fair market value and reselling it at a lower re-use price to an institution such as the St. John's Roman Catholic Church. In the case of *64th St. Residences* v. *City of New York,* 4 N.Y.2d 268, 174 N.Y.S.2d 1 (1958), the Court had before it this very same issue. In that case Fordham University was sold land which was restricted to educational purposes at $7 per square foot. The Petitioner argued that since the property was acquired by the City of New York for $16 per square foot that the sale to Fordham University, a Roman Catholic institution, at a lower price was in violation of the New York and Federal Constitutions, and claimed it to be an illegal grant or subsidy of public monies to a religious corporation. The Court was cognizant that the land being sold to the University was subject to a diminution in price because of its re-use for restricted purposes. Thus, the Court held in pertinent part as follows:

"Plaintiffs say that because the city arranged to sell this land at a price much below what the city will pay for it, this necessarily amounts to a subsidy or gift. *But what the city is buying is not the same as what Fordham is buying. The city buys land and buildings. Fordham buys the same property but subject to its agreement to raze the buildings, relocate the tenants and use the cleared land for a collegiate campus and buildings only. What Fordham is paying for is the re-use value of the land.* There is in this record no dispute of the fact, found by both courts below, that the $7 per square foot which Fordham agreed to bid, and did bid, is at least equal to the re-use value as established by several appraisals, all of which reported figures lower than $7 per square foot. Therefore, there is no substance to the assertion, on which this whole suit depends, that Fordham is getting a gift, grant or subsidy of public property. It is, of course, getting a benefit in the sense that it is being permitted to acquire valuable and desirable property at a price which is probably lower than it would have to pay if it had to negotiate with all the private owners, but the private owners are getting from the city the full value of the property in its present condition and use. The city benefits by the achievement of its valid municipal purpose of eliminating a slum. *The State and Federal statutes contemplate that the purchaser from the city will pay less than the city pays since it will always be the case that the city is buying land and buildings and selling either cleared land or land which the purchaser must agree to clear and use for restricted purposes.*" (Emphasis added.) *64th St. Residences* v.

City of New York, 4 N.Y.2d at 275-76, 174 N.Y.S.2d at 5 (1958).

Petitioner attempts to limit the *64th St. Residences* case to its facts based upon Petitioner's interpretation of *Tarshis* v. *City of New York,* 24 A.D.2d 644, 262 N.Y.S.2d 538, *modified,* 263 N.Y.S.2d 307, *aff'd,* 266 N.Y.S.2d 810 (1965). However, a reading of the *Tarshis* case will clearly show that that case is not applicable to the present controversy. In the first instance *Tarshis* does not involve a taking for redevelopment purposes, but rather involves a sale of city land pursuant to a City of New York charter provision.

Equally important, the *Tarshis* holding turns upon a distinct and unique provision of the New York City Charter. The *Tarshis* Court held only that the City's rejection of a higher bid and sale of the property to a lower bidder violated the Charter [§384, subd. b] which provides that "[e]xcept as otherwise specifically provided by law," City land may be sold "only for the highest marketable price . . . at public auction." *Tarshis, supra,* at 539. In fact, the *Tarshis* opinion itself notes that the *64th St. Residences* case proceeds pursuant to a different statute which permits sales to be made subject to covenants insuring that the property would be used for purposes consistent with the applicable plans for rehabilitation of the areas in question, *i.e.,* in redevelopment cases. Even though *Tarshis* notes that the statute in the *64th St. Residences* case required property be sold at "the highest marketable price . . . at public auction" a reading of the statute itself clearly shows that the statute provides that the land be sold with a restriction that it be used only for the purpose provided in

the renewal plan. Thus, in light of the statute the *64th St. Residences* Court is obviously talking about highest marketable re-use price.

While Petitioner stresses that the *64th St. Residences* case turns on the public nature of the bidding, in actuality there was no public bidding. The above cited quotation from that case clearly indicates that the sale was at an "arranged" price between Fordham, the only bidder, and the City of New York.

It should be pointed out that the requirement for public auction as provided in the governing statutes in both *Tarshis* and *64th St. Residences* does not obtain under the Connecticut General Statutes. *Conn. Gen. Stats.* §8-137 (Rev. 1958).

It can be seen from Petitioner's argument that the crux of its position is that the price differential, is an unconstitutional grant to the Church. As shown above, this price differential itself is not unconstitutional.

Petitioner concedes the constitutionality of the equal exchange provisions with the Church and concedes that Respondent is motivated by a secular purpose. It is apparent that Petitioner would have no quarrel with the whole procedure if land were sold to the Church without regard to its re-use limitation. Petitioner states that Respondent could have achieved its valid purpose by merely exchanging land with the Church. Brief for Petitioner at 10.

Petitioner's argument when carefully reviewed, in fact asks the Court to adopt a position which discriminates against the Church and would be legislatively hostile to the Church. The Petitioner's argument would have the Re-

spondent completely disregard the re-use formula as established by Federal regulations and would result in treating the Church differently from all other non-profit institutions receiving land from the Respondent to which the re-use formula must be applied.

The Establishment Clause of the First Amendment must be viewed not only in the light of its prohibition of the establishment of religion by advancement or sponsorship, but also in its guarantees that the Church at least be treated with "neutrality and voluntarism." *Walz* v. *Tax Comm'n*, 90 S. Ct. —— (May 4, 1970) (Opinion of the Court at 3).

II.

The equal exchange provision of the urban renewal plan as it affects Petitioner's property does not violate the establishment clause of the Constitution.

Petitioner contends that the sale of his land to the St. John's Roman Catholic Church does not meet the test known as the "Schempp Test." Respondents do not dispute that the Federal and State Constitutions prohibit the government giving direct aid to a religious organization or institution. Respondents do contend, however, that the facts of the present case will clearly indicate that the purpose and the effect of the redevelopment program and the sale of Petitioner's land to the Church is for a predominantly secular purpose.

It has been judicially recognized by this Court that a balanced program of integrated uses is important in developing a comprehensive redevelopment plan. In keeping with this program of integrated uses, the existence of

schools, churches and parks serves a high public purpose as part of any balanced program. As stated by Mr. Justice Douglas speaking for a unanimous Court in *Berman* v. *Parker*, 348 U.S. 26 (1954):

> "It was important to redesign the whole area so as to eliminate the conditions that cause slums—the overcrowding of dwellings, the lack of parks, the lack of adequate streets and alleys, the absence of recreational areas, the lack of light and air, the presence of outmoded street patterns. It was believed that the piecemeal approach, the removal of individual structures, structures that were offensive, would be only a palliative. *The entire area needed redesigning so that a balanced, integrated plan could be developed for the region, including not only new homes but also schools, churches, parks, streets and shopping centers.* In this way it was hoped that the cycle of decay of the area could be controlled and the birth of future slums prevented." (Emphasis added.) 348 U.S. at 34-35.

Petitioner's basic position in this case completely overlooks the fact that whatever land the Church is receiving is a part of an overall redevelopment program for downtown Stamford. Petitioner does not challenge the fact that the purpose of the redevelopment program is to eliminate substandard housing, incompatible land uses, inadequate parking and traffic circulation, periodic flooding and ineffective utilization of land. Nor does he contest that to restore the downtown area of Stamford as the vital heart of the City the full *economic and social potential* of the central core must be nurtured by intense development and multi-use.

Keeping the Church downtown has an obvious secular purpose and public benefit in that it is one of the institutions which will help realize the full "social potential" of the area and is one of the "multi-uses" the Plan seeks to provide.

Petitioner's argument might have validity if this were a case where Petitioner's property were being condemned solely to sell it to the Church; however, as demonstrated above where Petitioner's property is being sold to a Church as part of a redevelopment program, his contention must fail.

It is important to note that many cases have been decided where it has expressly been held that it is permissible to sell property to an institution controlled by a religious denomination. The case of the *64th St. Residences, supra,* has a clear holding that the sale of land to Fordham University, a Roman Catholic institution, was not an unconstitutional grant or subsidy of public monies to a religious corporation. To the same effect see *Kintzele* v. *St. Louis,* 347 S.W.2d 695 (1961) holding that the sale of land to a University controlled by a religious denomination was not a use of public money in aid of a private sectarian school and *Ellis* v. *Grand Rapids,* 257 F. Supp. 564 (W.D. Mich. S.D. 1968), holding valid sale to St. Mary's Hospital even though there is an incidental and indirect benefiting of a religious interest.

In a more recent case handed down by the United States Supreme Court, it found that a New York statute requiring local public school authorities to lend textbooks free of charge to all students including those in private parochial schools, did not violate the Establishment Clause of the

Federal and New York constitutions. In the case of *Board of Education* v. *Allen*, 392 U.S. 236 (1968), this Court found that even the lending of textbooks to a school supported by a religious institution had a secular purpose. To the same effect see *Snyder* v. *Town of Newtown*, 147 Conn. 374, 161 A.2d 770, *appeal dismissed*, 365 U.S. 299 (1961).

Thus it would seem that the overwhelming secular purpose of keeping the St. John's Roman Catholic Church in the redevelopment area is to have a "balanced integrated plan" (*Berman, supra*, at 34-35) and permits the sale of Petitioner's property to the St. John's Roman Catholic Church. Respondents submit that this case is really no different from the *64th St. Residences* case, *supra*, wherein the property was likewise sold to a religious institution at the special re-use price because of the restricted use to be made of the land under a redevelopment program.

In *Walz* v. *Tax Commission of the City of New York*, this Court held that the grant of tax exemption to equal religious institutions was not such an aid to a religion that it violated the Establishment Clause of the Constitution. 90 S. Ct. —— (May 4, 1970). The factors which were considered as controlling in *Walz* apply with equal if not greater force to this case.

Obviously the purpose of the equal exchange provision in this case is not to sponsor or foster the Church; rather it is to insure that the downtown area of Stamford be reestablished and redeveloped so as to create a balanced, integrated plan, "to contribute to the well-being of the community in a variety of non-religious ways. . . ." (*Walz, supra*) (Brennen, *J.* at 8).

Furthermore, the effect of the application of a re-use formula to the land being sold to the Church is a single incident taking place at the time of sale and is not one calling for "official and continuing surveillance leading to an impermissible degree of entanglement" between Church and State. *Walz, supra,* at 9.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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May 29, 1970

APPENDIX

APPENDIX A

Additional Statutes Cited

§ 8-137. Transfer, Sale or Lease of Real Property in a Redevelopment Area

The redevelopment agency, for the purpose of this chapter, may sell or lease for such sums as are agreed upon the whole or any part of a redevelopment area to the redeveloper or, if the property is to be used for public purposes, to an appropriate public agency. The consideration paid for the sale or lease of the property shall be determined by the redevelopment agency, provided, if the cost or carrying charges of such land to the redevelopment agency are greater than such consideration, the redevelopment agency shall first have specific authorization from the legislative body of the municipality for the sale or lease at any lesser consideration, and the municipality may appropriate and authorize the expenditure of money to compensate for any portion of the difference between the acquisition cost of such property and such sale or lease price of such property at a lesser consideration to a redeveloper, but in no case shall such sale or lease price be lower than the use value of such property. Each contract for sale or lease to a redeveloper shall provide, among other things, (a) that the property transferred shall be developed and used in accordance with the redevelopment plan or such plan as modified with the approval of the redevelopment agency . . . . (1949 Rev., § 984; 1957, P.A. 13, § 55; 1957, P.A. 648).